GRB Entertainment, Inc. d/b/a Aardvark Post and International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the U.S. and Canada, AFL-CIO, CLC, Petitioner. Case 31–RC-7551

June 13, 2000

DECISION AND DIRECTION

BY MEMBERS FOX, LIEBMAN, AND BRAME

The National Labor Relations Board, by a three-member panel, has considered determinative challenges to an election held October 28, 1997, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 11 for and 7 against the Petitioner, with 15 challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings¹ and recommendations² only to the extent consistent with this Decision and Direction.

The hearing officer found that Senior Staff Editor Roger Bartlett was a supervisor within the meaning of Section 2(11) of the Act and therefore recommended that the challenge to his ballot be sustained. The basis for the hearing officer's finding was her conclusion that Bartlett effectively recommended applicants to the director of post production, Jeff Kimes, for hire without Kimes' further independent review. The Employer excepts, contending that Kimes retained hiring authority and that Bartlett's role in the hiring process was merely to screen applicants to determine their technical skill because Kimes did not have the technical knowledge of the editing equipment. We find merit in the Employer's exception.

The Employer's business involves audio and visual post production editing work for programming shown on cable television. The Employer employs dubbers, editors, assistant editors, audio editors, and tape librarians. The record reflects that during the period at issue, when there was a need to increase the number of assistant editors, first assistant editor Wendy Quick collected available resumes for Bartlett to screen in order to determine who would be interviewed, and scheduled interviews for applicants Bartlett selected. Bartlett then interviewed the applicants, sometimes with Quick and sometimes alone, and gave them a test on the editing machine. Kimes then interviewed the applicants referred to him by Bartlett, sometimes with Quick and sometimes alone.

Kevin Ham, who was employed by the Employer from March to December 1997, testified that while being interviewed by Bartlett, he was tested on the editing machine, asked about his background, and told how much money he would be paid and what hours he would work. Ham also testified that he was subsequently interviewed by Kimes, who again asked him about his background. Kimes then asked him when he could begin, and how long he could work for the Employer. Michael Karlman, who was employed by the Employer from April to approximately December 1997, testified that when he went to interview with Bartlett, he was taken straight to the editing bays. Bartlett did not ask him any questions, but asked Karlman to perform certain tasks on the editing machine to ensure that he knew how to use it. Karlman then interviewed with Kimes. Kimes briefly asked Karlman about his background, described the position, and stated what the Employer was looking for in an assistant editor. Kimes then told Karlman that he had better be comfortable working the graveyard shift because that was the shift for which he was going to be

Kimes testified that Bartlett's function was basically to let him know if the applicants were technically able to handle the position. Kimes testified that after Bartlett tested and interviewed an applicant Bartlett would meet with him and verbally transmit Bartlett's evaluation of the applicant's abilities. Kimes testified that Bartlett never recommended an applicant for hire or recommended against hiring an applicant. Kimes testified that at least one assistant editor, Wendy Quick, was hired without Bartlett either interviewing her or evaluating whether she was capable of handling the job. Specifically, Kimes testified that Bartlett's part of the job was strictly to determine if the applicants were knowledgeable on the technical side and Kimes' part was to determine if they would "fit into" the Employer's operation. Finally, while Kimes testified that he had never in the past hired a person that Bartlett said did not have the technical skills, he did not discount the possibility of hiring someone without demonstrated technical skills in the future. Kimes also testified that he had the final say. This was confirmed by first assistant editor Wendy Quick's testimony that Kimes gave the final "stamp of approval" to the applicants who were tested and interviewed by Bartlett.

Based on the above, we disagree with the hearing officer that Bartlett effectively recommended applicants for hire. It is undisputed that Bartlett never made a recommendation to Kimes that an applicant be hired or rejected. Rather, his role in the hiring process was limited to testing each appli-

¹ The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

We adopt the hearing officer's recommendation to sustain the challenge of Li Po Ching's ballot. In doing so, we rely solely on the finding that Ching was briefly employed before the election as a temporary substitute for a vacationing individual. Thus, we sustain the challenge to Ching's ballot solely on the ground that he was a temporary employee. We find it unnecessary to pass on the hearing officer's finding that Ching was a supervisor.

² In absence of exceptions, we adopt pro forma the hearing officer's recommendation to sustain the challenges to the ballots of Julian Gomez and Howard Lamden and to overrule the challenges to the ballots of Dan Luna, Greg Schiff, Ryan Gold, and Paul Vincent. Further because the challenges to the ballots of Rodney Conner, Mark Teixreira, Steve Bock, and Greg Byers were withdrawn, we adopt the hearing officer's recommendation that their ballots be opened and counted.

cant's technical skills by conducting editing tests and reporting those results to Kimes.

The Board has consistently found that such an assessment of an applicant's technical ability to perform the required work does not constitute an effective recommendation to hire. Hogan Mfg., Inc. 305 NLRB 806 (1991); The Door, 297 NLRB 601 (1990); Plumbers Local 195 (Jefferson Chemical Co.), 237 NLRB 1099, 1102 (1978). As these cases make clear, the fact that Kimes accepted and relied on Bartlett's technical assessment of applicants represents a deference to Bartlett's technical expertise, which Kimes acknowledged that he lacked, rather than a delegation of statutory supervisory authority. Accordingly, we find that the Petitioner has failed to meet its burden of establishing that Bartlett has the authority to effectively recommend applicants for hire.

Finally, there is no other basis for finding that Bartlett is a supervisor. There is no evidence that Bartlett has the authority to transfer, suspend, lay off, recall, promote, discharge, reward employees, or adjust their grievances. The facts noted by the hearing officer that Bartlett attended management meetings and that others perceived him to be a supervisor are secondary indicia of supervisory status and, because we have not found any primary indicia of supervisory status, cannot be dispositive to finding that Bartlett is a Section 2(11) supervisor. *General Security Services Corp.*, 326 NLRB 312 (1998); and *Billows Electric Supply*, 311 NLRB 878 fn. 2 (1993).

In sum, we find that the evidence fails to establish that Bartlett is a supervisor, and thus the challenge to his ballot should be overruled. Accordingly, we shall remand this matter to the Regional Director pursuant to this Decision and the following Direction.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 31, within 14 days from the date of the decision, shall open and count the ballots of Roger Bartlett, Dan Luna, Greg Schiff, Ryan Gold, Paul Vincent, Rodney Conner, Mark Teixreira, Steve Bock, and Greg Byers. The Regional Director shall then serve on the parties a revised tally of ballots. If based on the tally, the Petitioner has received a majority of the votes cast, the Regional Director shall issue a certification of representative. If the Petitioner has not received a majority of the votes cast, then the Regional Director will issue a notice of hearing on objections.

MEMBER BRAME, dissenting in part.

I agree with the majority's adoption of the hearing officer's recommendation that the challenges to the ballots of the post production employees be sustained. I further agree with the majority's adoption of the hearing officer's recommendation that the challenge to Li Po Ching's ballot be sustained; however, I would rely on both grounds given by the hearing officer for her decision, i.e., that Ching was both a temporary employee and a supervisor. Finally, I disagree with the majority's conclusion that the record evidence does not support a finding that Roger Bartlett is a supervisor within the meaning of Section 2(11) of the Act. The term supervisor means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical in nature, but requires the use of independent judgment. I agree with the hearing officer that Bartlett should be found to be a supervisor because he effectively recommends applicants for hire to Director of Post Production Jeff Kimes.

The record evidence reflects Bartlett's involvement in all aspects of the Employer's hiring of assistant editors. Bartlett selected the individuals to interview for the assistant editor openings from resumes gathered by first assistant editor Quick. He then interviewed, tested, and questioned those he selected to determine their technical skill levels. Kimes testified that he never hired an individual that Bartlett first did not approve. His testimony was corroborated by Quick who testified specifically that during interviews Kimes gave his "stamp of approval" to Bartlett's recommendations.

Contrary to the majority's finding, I find that Bartlett did more than just test applicants and report the test results to Kimes. Former employee Kevin Ham testified that during his interview with Bartlett, Bartlett asked him about his background, told him how much that he would be paid, and the number of hours that he would work. Ham further testified that Kimes, during Ham's second interview, did not provide further information concerning the terms and conditions that Bartlett discussed. Bartlett thus conducted a thorough interview of this applicant and referred him to Kimes for his "stamp of approval." Further, Kimes himself conceded that he had never hired anyone that Barlett had not recommended as technically capable of performing the job. I find this testimony to establish effective recommendation, despite testimony that Kimes retained final approval authority.

In my view, where an employee selects candidates from the available resumes, interviews candidates, tells them the terms and conditions of their employment, decides which of the candidates interviewed have the requisite skill qualifications, and selects candidates for hire without independent technical review, that individual possesses the authority to make effective recommendation in hiring. See *RB Associates*, 324 NLRB 874, 879 (1997). The facts that Kimes

³ We find *RB Associates*, 324 NLRB 874, 879 (1997), relied on by our dissenting colleague, to be distinguishable. In that case, the employer not only delegated to the disputed supervisor the responsibility to assess applicants' qualifications but also the responsibility to make the final selection from which the qualified applicants should be hired.

¹ In my view, the fact that Kimes speculates he might in the future hire someone that Bartlett has not recommended is irrelevant.

may wish to make his own inquiry into an applicant's background, assess "fit," or describe to an applicant terms and conditions of employment upon hire, does not negate his reliance on Bartlett's hiring recommendations, or render Bartlett's recommendations ineffective. Therefore, I find, in agreement with the hearing officer, that Bartlett is a supervisor under Section 2(11) of the Act and that the challenge to his ballot should be sustained.